FILE COPY

Office - Supreme Court
FILED
MAR 1 19
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 909

WALTER E. MEYER, Intervener,

Petitioner,

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WALTER E. MEYER,
Petitioner, *Pro Se*,
And as Attorney for other Stockholders,
31 Nassau Street,
New York 5, N. Y.

R. WALSTON CHUBB,
Attorney for Petitioner,
408 Olive Street,
St. Louis 2, Missouri.

February 28, 1947.

INDEX

PAGE

In Reply to Southern Pacific's Brief 2

As to Southern Pacific's discussion of Point I of petitioner's brief 2

As to Southern Pacific's discussion of Point II of petitioner's brief 14

As to Southern Pacific's discussion of Point III of petitioner's brief 16

As to Southern Pacific's discussion of Point IV of petitioner's brief 18

As to the Briefs in Opposition of the Other Respondents 22

Conclusion 28

CASES CITED

Bigelow v. Old Dominion C. Min. & S. Co., 225 U. S. 111 10

Connecticut Ry. Co. v. Palmer, 305 U. S. 493 6

Dickinson v. Universal Service Stations (C. C. A. 9), 100 F. (2d) 753 6

Ecker v. Western Pacific R. Corp., 318 U. S. 448 .....2, 3, 12

Edward Hines Western Pine Co. v. First Nat. Bank (C. C. A. 7), 61 F. (2d) 503 10

Gratiot County State Bank v. Johnson, 249 U. S. 246 10

Malony v. Adsit, 175 U. S. 281 19

Manson v. Williams, 213 U. S. 453 10

Massee & Felton Lumber Co. v. Benenson (S. D., N. Y.), 23 F. (2d) 107 10

Myers v. International Trust Co., 263 U. S. 64 10

Lyon v. Perin & Gaff Mfg. Co., 125 U. S. 698 10

Reconstruction Fin. Corp. v. Denver & Rio G. W. R. Co., 90 L. ed. 1134 23

PAGE

Sexton v. Dreyfus, 219 U. S. 339 6

Wake Development Co. v. Auburn-Fuller Co. (C. C. A. 9), 71 F. (2d) 702 7

United States v. Marxen, 307 U. S. 200 6

White v. Stump, 266 U. S. 310 6

STATUTES AND OTHER AUTHORITIES

Bankruptcy Act

Section 77 (11 U. S. C. § 205)

Subsection (b) 6

Subsection (e) 19

Federal Rules of Civil Procedure, Rule 63 19

Hearings before Senate Committee on Interstate Commerce on H. R. 2536, 79th Cong., 2d Sess. 17

Interstate Commerce Act

Section 5 (2) (49 U. S. C. § 5 (2)) 8

Section 12 (49 U. S. C. § 12) 14

Report of Senate Committee on Interstate Commerce (S. Rep. 1170) on S. 1253, 79th Cong., 2nd Sess. 15

In the

Supreme Court of the United States

October Term, 1946.

No. 909

Walter E. Meyer, Intervener,

Petitioner,

v.

Berryman Henwood, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is in reply to the briefs in opposition of respondents Southern Pacific Company, a large creditor and controlling stockholder of debtor; Guaranty Trust Company of New York, Trustee under the debtor's First Terminal and Unifying Mortgage; the Protective Committee for the holders of the debtor's First Terminal and Unifying Mortgage bonds; Chemical Bank & Trust Company, as Successor Trustee under the debtor's General and Refunding Mortgage; and The Chase National Bank of the City of New York and Mississippi Valley Trust Company, creditors.

In Reply to Southern Pacific's Brief:

As to Southern Pacific's discussion of Point I of petitioner's brief:

Chief among the reasons relied on by petitioner for the allowance of a writ is that in disregard of the opinion of this Court in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 478, 479, 514, and other cases, the District Court failed to make a review and the Circuit Court of Appeals failed to make an independent review (a) of the proof in the record of the illegal impairment of earnings of the debtor during the period which the Commission took on which it made its estimate of prospective earnings for the purpose of determining the capitalization of the debtor in its plan of reorganization (Petition, p. 19, par. 2), and (b) of the proof which required that in the plan Southern Pacific's claim as creditor and stockholder be expunged or subordinated (p. 20, par. 3). (Brief, pp. 26-36)

Southern Pacific argues that the first of these reasons involves a matter of valuation and that this Court has taken the position that "valuation matters are primarily for the Commission and that the judicial function of review does not extend to weighing the evidence but only to ascertaining whether the Commission's findings are supported by substantial evidence, and whether it has followed proper legal standards" (S. P. Brief, p. 26). In support Southern Pacific quotes the language of the opinion in the *Western Pacific* case at pages 472-473, in which this Court discusses the review required in the ordinary or simple case of valuation where no "legal objection" has been raised to the use by the Commission of its own valuation.

Southern Pacific omits all reference to that part of the opinion which holds that where claimants under a plan are being deprived of their entire equity "a wider scope

of review" is necessary "than an inquiry as to whether statutory standards for valuation have been followed" (p. 478), and to the language that follows from which it appears that there must be review to determine whether there is "legal objection" to the Commission's use of its own valuation. This Court there states (p. 479):

> "The court properly affirms the Commission, when it finds *no legal objection* to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization. For example, there may arise controversies over the priority or the validity of claims. A Commission finding involving such problems would require *an independent examination and an affirmation by the court.*"*

In further disregard of the holding of this Court in the *Western Pacific* case, Southern Pacific cites (p. 32) a line of cases prior to that decision, to the effect that "virtually the only place where findings of fact of an administrative body will receive an independent judicial review is in the narrow field where the facts are 'constitutional facts'." Clearly the cases cited are not applicable to a Section 77 proceeding involving a determination of the respective functions of the Interstate Commerce Commission and the courts.

Southern Pacific claims that the statement of petitioner in his brief (p. 32), that the evidence introduced before the District Court was not considered by either the District Court or the Circuit Court, is without foundation (S. P. Brief, pp. 33-34). In support thereof reference is made to a statement in the opinion of the District Court (R. 5202) that: "He [petitioner] has not convinced either this Court or the Commission that his charges are well-founded."

---

* Emphasis supplied.

The District Court held (R. 5203):

> "The question of the feasibility of a lease is, of course, a matter within the exclusive jurisdiction of the *I. C. C.* (49 U. S. C. 5). This, as well as a determination of the validity of Meyer's charges of bad faith are matters requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements, and other data peculiarly within the comprehension of the I. C. C. We are of the opinion that the *Commission* has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the *Commission* on this account and, accordingly, overrule Meyer's objections to the plan of reorganization."*

The proof introduced in the District Court in support of petitioner's charges was of a similar nature to that introduced in the hearings before the Commission. In view of the holding that the validity of petitioner's "charges of bad faith" was a matter requiring study by experts and of the entire opinion of the District Court, which clearly indicates that it made no review of the proof in the record, it cannot be seriously claimed that the proof introduced either in the hearings before the Commission or before Judge Davis was reviewed by Judge Moore, Judge Davis' successor. The remarkable situation is thus presented that in these reorganization proceedings the important proof introduced in the hearings before Judge Davis has not been reviewed by the Commission or the District Court, or indeed, as has been brought out, by the Circuit Court of Appeals.

Southern Pacific contends (p. 34) that because Judge Davis ruled that "the testimony before him would be re-

---

* Emphasis supplied.

stricted to the period occurring subsequent to the consideration of the plan by the Commission (R. 4186)," and because the Circuit Court of Appeals stated that "considerable documentary evidence relating to the period prior to that time was introduced" (R. 5569), that such evidence was introduced in violation of the Court's order, which petitioner did not attack, and therefore the said documentary evidence "could properly be disregarded."

A glance at the index to the printed record shows that with but very little exception the documentary proof as to events preceding the date of the close of the hearings was limited to certain proof marked for identification Exhibits 10 to 15, selected letters from which are included at pages 4993 to 5116 of the record. The Court ruled against the admission of these exhibits, to which petitioner formally excepted. At the time the Court stated: "* * * exceptions are saved as a matter of course, and you need not expressly do it." (R. 4203-4205)

A very limited use was made of this proof in petitioner's briefs to the District Court and to the Circuit Court of Appeals, inasmuch as he was not allowed to examine the traffic officials of Southern Pacific or debtor on the matters treated. If Judge Davis, as the proceedings progressed, chose in certain instances to admit documentary evidence of matters which were explanatory of and supplementary to the main items of proof placed in the record as to events that took place after the close of the hearings before the Commission, this was entirely within his discretion.

Southern Pacific claims (p. 35) that because "it has been held time and again that the rights of creditors are fixed, both as to the bankrupt and between themselves, as of the date of the filing of the petition in bankruptcy," on that account no proof of developments subsequent to such date may be considered on the issue of expunging its

claim.* In support of its position in this respect the following cases are cited: *United States* v. *Marxen,* 307 U. S. 200, 207; *Sexton* v. *Dreyfus,* 219 U. S. 339, 344; *White* v. *Stump,* 266 U. S. 310, 313. These cases are all cases of liquidating bankruptcies. Southern Pacific cites no cases in railroad or corporate reorganization proceedings.

The definitions of "provable claims" and "creditors" are very much broader in Section 77 than in ordinary bankruptcy. Subsection (b) of Section 77 states: "The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease."

This Court gave consideration to the above language in *Connecticut Ry. Co.* v. *Palmer,* 305 U. S. 493, where it held that upon the rejection of a lease in a Section 77 proceeding the measure of damage was the actual damage determinable in equity proceedings and that the Act fixed no time limit to the amount.

In many ways a railroad reorganization proceeding may be regarded as a substitute for reorganization through equity receivership.

In an equity receivership, for example, a claim whether past due, immature or contingent, is provable of which the worth or amount can be determined by recognized methods of computation at a time consistent with the expeditious settlement of the estate. *Dickinson* v. *Uni-*

---

* It came out in the hearings before Judge Davis that the files of Southern Pacific's subsidiary, Texas & New Orleans, up to and including the year 1934, bearing on its relations with the debtor, had been destroyed in November or December, 1940 (Testimony of F. L. Gordon, Traffic Manager of Texas & New Orleans, R. 4311-16).

versal Service Stations, 100 F. (2d) 753, 757; *Wake Development Co.* v. *Auburn-Fuller Co.,* 71 F. (2d) 702.

Even if it were held that these precedents in liquidating bankruptcy proceedings are applicable in a Section 77 proceeding, proof as to breaches by Southern Pacific Company of its obligations to debtor after 1935 is relevant to a consideration of such breaches of obligation previous to the filing of the petition for reorganization.

There is, however, abundant proof in the record as to Southern Pacific's wrongful and illegal acts in its relations with debtor during the period 1925 to 1935 and previous to the filing of the petition, which call for the expunging or subordination of the claim.

Southern Pacific contends (p. 35) that it "has never denied its legal duty to Debtor and its minority stockholders under such cases as *Taylor* v. *Standard Gas & Electric Co.,* 306 U. S. 307."

The fact is to the contrary. In Southern Pacific's brief submitted to the Commission on June 3, 1940, after the close of the hearings, there is the following point heading (p. 107):

> "With a 13% Minority Stock Interest Outstanding, St. Louis Southwestern Has Been Independently Operated, Without Interference or Domination By Southern Pacific."

In the discussion under this head Southern Pacific states:

> "The Southern Pacific or its subsidiary, Texas & New Orleans Railroad Company, or any of their directors, officers or employes, has not interfered with or undertaken to control in any respect the management or operation of St. Louis Southwestern Railway, including its management, traffic, maintenance, and operation policies or methods because of

> the influence of Kuhn, Loeb & Company, or for any other reason, real or imaginary. The St. Louis Southwestern System has been managed and operated as an independent carrier in its own best interests. Officers and directors of the Southern Pacific, who have functioned as officers and directors of the St. Louis Southwestern, have functioned in the performance of their duties as St. Louis Southwestern officials and not as Southern Pacific officials."

Petitioner answered these contentions in his brief submitted to the Commission in April 1940 (R. 3375-81). In this absurd contention that it did not control debtor after it had made application under Section 5, paragraph (2) of the Act and had been authorized by the Commission to acquire a majority stock interest in debtor, Southern Pacific received the Commission's support. The Commission in its report held that Southern Pacific did its full duty to the debtor in giving it an independent board of directors (R. 3669).*

In further contravention of petitioner's argument that he was entitled to an independent judicial review of the proof in the record on which he based his contention that

---

* On December 12, 1935, the date of the filing of the petition for reorganization of debtor, the members of its board of directors, the respective positions held by them and the amount of stock owned were as follows: Hale Holden, Chairman of Southern Pacific Company, 100 shares common; A. D. McDonald, President of Southern Pacific, 100 shares common; Paul Shoup, Vice-Chairman of Southern Pacific, 100 shares common; Ben C. Dey, general counsel for Southern Pacific, 100 common; Daniel Upthegrove, President of debtor, 100 shares common; Frank M. Gould, Vice-President of debtor, 100 shares preferred; Paul J. Longua, Secretary of debtor, 10 shares preferred; Alfred H. Swayne, 100 shares common; W. W. Cumberland, none (R. 1051; 3375-3376). It thus appears that seven of the nine directors were either officials of Southern Pacific or of debtor. Obviously the tenure of office of the three officials of debtor who served as directors was dependent upon their not incurring the ill-will of the majority control. Mr. Dey, testifying as a witness, admitted that the stock held by some of the directors was perhaps owned by Southern Pacific Company (R. 2410).

Southern Pacific's claim should be expunged or at least subordinated, Southern Pacific (p. 28) points to the fact that objections to its claim against debtor were filed by certain foreign bondholders and that these objections "had been overruled by the Court after extensive hearing and the claim allowed." Southern Pacific continues (p. 28):

> "The attack upon Respondent's claim by the foreign bondholders was similar to that made by Petitioner, since they charged that the claim should be expunged or subordinated because of alleged mismanagement of Debtor by Respondent (R. 3982, 3996, 3998)."

The Special Master's report shows that the foreign bondholders alleged (1) that the claimant, Southern Pacific, so dominated and controlled the debtor that its proof of claim against its subsidiary was in fact a claim against itself and should be disallowed as a legal fraud upon minority stockholders and creditors; and (2) that Southern Pacific "should have assisted debtor in the spring of 1935 by agreeing with the Reconstruction Finance Corporation to let its collateral, pledged to secure its individual loan, stand as security for a new loan to pay off existing bank indebtedness of Debtor at sixty-five cents on the dollar" (R. 3992, 3993).

In referring to these hearings and to the report of the Special Master, the District Court held: "* * * it does not appear that the issues raised by the objections are co-extensive with those raised by Meyer in his objections to the plan" (R. 5199).

Petitioner's charges against Southern Pacific embodied in his objections and claims for equitable treatment are very different from the somewhat technical and limited objections of the foreign bondholders.

Petitioner did not contend that Southern Pacific's claim against debtor was a claim against itself. He asked un-

der paragraph (3) of his objections that Southern Pacific's claim as a creditor and stockholder be expunged or at least subordinated because "Southern Pacific has both violated its legal obligations to debtor, by which the debtor has been greatly damaged, and has acted unconscionably in failing to take measures by which the earnings of the debtor would have been greatly increased." Under paragraph (8) of the objections and paragraph (2) of the claims for equitable treatment, the grounds for asking for the subordination of Southern Pacific's claim are set forth in detail (R. 3842, 3844-46).

In *Lyon* v. *Perin & Gaff Mfg. Co.*, 125 U. S. 698, this Court held:

> "It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz.: (1) *Identity in the thing sued for;* (2) *identity of the cause of action;* (3) *identity of persons and parties to the action;* and (4) *identity of the quality in the persons* for or against whom the claim is made * * *."

In order to render a matter *res adjudicata*, there must be at least an identity of parties and of issues. *Myers* v. *International Trust Co.*, 263 U. S. 64, 71; *Bigelow* v. *Old Dominion C. Min. & S. Co.*, 225 U. S. 111, 126.

The principles of *res adjudicata* have been held to apply to the allowance of claims in bankruptcy proceedings. *Edward Hines Western Pine Co.* v. *First Nat. Bank*, 61 F. (2d) 503; *Massee & Felton Lumber Co.* v. *Benenson*, 23 F. (2d) 107. See also: *Gratiot County State Bank* v. *Johnson*, 249 U. S. 246; *Manson* v. *Williams*, 213 U. S. 453.

In the instant case there was no identity of parties, as petitioner did not appear or participate in the proceedings before the Special Master. Nor was there any identity in the cause of action. The findings of the Special Master bound only the foreign bondholders who protested the claim.

Because petitioner was of the opinion that the matter of the validity of Southern Pacific's claim was a matter to be first passed upon by the Commission, subject to review by the court, he did not deem it advisable to participate in the proceedings before Special Master Early.

Petitioner in December 1935, a few days after the filing of the petition for reorganization, called to the Commission's attention his charges against Southern Pacific (R. 393, 451). Petitioner endeavored but without success to introduce proof at the hearings before the Commission in 1937 in support of his charges (R. 430-431). Formal petitions reiterating these charges and requesting an investigation were filed respectively in April and June, 1937 (R. 339-351; 357-467). About 1200 security holders joined in the petitions for investigation (R. 3840). The reorganization proceedings were reopened in 1939 (R. 500). At the reopened hearings petitioner placed much proof in the record in support of his charges (R. 529 *et seq.*). He asked the Commission to make an investigation, if, indeed, in view of the strength of such proof, an investigation was necessary (R. 3443).

The objections of the foreign bondholders to Southern Pacific's claim were filed on July 15, 1937 (R. 3982). The hearings thereon were held on November 14, 1938 (R. 3985), and during a period when petitioner was awaiting a decision by the Commission on the petitions for investigation.

To hold that by proceedings in the District Court upon objections to a claim, the Commission can be deprived, in connection with its formulation of a plan of reorganization, of the right of determining in the first instance and subject to review by the court, a controversy over the priority or validity of claims would be to deprive the Commission to that extent of the important function given it under the statute of formulating the plan of reorganization.

Here Southern Pacific argues on the one hand that a determination of the Commission is not subject to an independent review by the court and points to the "complicated and technical transportation problems requiring judicial abnegation in order to give free play to the Commission's expertise" (S. P. Brief, p. 32). In the same brief it stoutly argues that the District Court through confirming the report of its Special Master could preclude the Commission in formulating its plan from passing upon the validity or priority of a claim.

Petitioner stated in his brief in support of his petition (p. 34) that any differentiation in these proceedings as to the extent and scope of the review required by the courts as between the issue of whether debtor's earnings were illegally impaired, and the issue as to whether the claim of Southern Pacific should be expunged or at least subordinated, was purely academic for the reason that all of the proof relevant to the one issue was relevant to the other.

This statement has evidently been misunderstood by Southern Pacific.

By way of further explanation, petitioner took the position (pp. 19-20, 34) that an independent review is necessary both as to illegal impairment of earnings and as to the priority and validity of Southern Pacific's claim.

In the *Western Pacific* case, as has been shown, this Court expressly held that in "controversies over the priority or the validity of claims" "an independent examination and an affirmation by the court" was required. It was also stated in the sentence immediately preceding this, that the court properly affirmed the Commission "when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization" (p. 479). This, too, would require an independent examination and affirmation though the language is not as

explicit as in the case of a controversy over the priority or validity of claims.

Petitioner reasoned: The Court explicitly states that an independent examination and affirmation is necessary to determine the priority or validity of claims. In view of this clear statement and the finding of the Commission, quoted at page 34 of petitioner's brief, to the effect that the proof in the record as to the first issue was the same as the proof in the record as to the second issue, further discussion would be academic as to whether an independent review was necessary in order to determine whether there was legal objection to the Commission's use of its own valuation. The clear necessity of an independent examination and review of the priority or validity of Southern Pacific's claim, proof for the two issues being identical, dispensed with the necessity of considering whether the review to determine whether there was legal objection to the Commission's use of its own valuation was of a more limited nature.

According to Southern Pacific, however, the lesser includes the greater. Southern Pacific argues that if it is only necessary to determine whether there was substantial evidence to support the Commission's valuation, it is only necessary to determine whether there was substantial evidence to support the Commission's findings as to the priority or validity of the claim.

And finally, Southern Pacific argues that: "It is evident that Petitioner's real aim is to have this Court reconsider in minute detail the great volume of conflicting evidence * * *." "Such factual matters," Southern Pacific avers, "while of importance to Petitioner, are not of such general importance as to warrant review by this Court" (p. 35).

The proof as to the illegal impairment of the earnings of debtor and the proof which requires the expunging or, at least, the subordination of Southern Pacific's claim

stand out in clear and bold relief. The question as to the respective functions of Commission and court in reorganization proceedings where it becomes necessary to pass upon proof involving breaches of fiduciary, contractual and other obligations by a railroad in its control of a debtor railroad should be determined by this Court. The interests of thousands of security holders, not only in this case but in all reorganization proceedings, are involved.

As to Southern Pacific's discussion of Point II of petitioner's brief:

Under this point petitioner argued that both the Commission and the District Court had failed to make the thorough investigation necessary to assure control of debtor in the interest of debtor and of all of its security holders upon emergence from reorganization proceedings. Southern Pacific takes the position that the question of "whether the Commission should institute an investigation" "is an administrative one within its sole discretion and not subject to judicial review" (S. P. Brief, p. 36).

While the Commission is given power to investigate under Section 12 of the Interstate Commerce Act (49 U. S. C. 12), whether the Commission is under a duty to investigate under Section 77 involves an interpretation of the intent of Congress in enacting Section 77.

In proof of the fact that the Commission did investigate, Southern Pacific states that the Commission caused an investigation to be made of "Meyer's charges of alleged diversion of business from the Debtor by Kansas City Southern Railway Company and other southwestern carriers during the years 1927, 1928 and 1929" (p. 37).

This statement fails to bring out that the investigation referred to, while it took place in the years 1927 to 1929, covered the years 1924 to 1927. Only one of these years, 1927, was included in the period 1927 to 1941 taken by the Commission on which it based its estimate of debtor's prospective earnings. No investigation was made for the other years.

Southern Pacific is content to state that in the Boyd report[1] to the Commission the conclusion was reached that no proof of diversion of traffic had been found (S. P. Brief, p. 37). It fails to refer to or to directly controvert the statement made by petitioner in his petition (p. 5), that, contrary to the report of the Bureau of Inquiry of the Commission, the data for the years 1924 to 1927, compiled by Kansas City Southern, Missouri-Kansas-Texas and debtor at the request of the Bureau, proved incontrovertibly that traffic in large amounts had been diverted from debtor to the two other roads during the period 1925 to 1927. That this was so is a mere matter of mathematical computation from the statistical data in the record compiled by the three roads at the request of the Bureau (R. 1727-87; 3055-89; 3472-81; 3600-04; see also 5777-83).

Southern Pacific avers (p. 37) that petitioner was given access to the files of the debtor. Petitioner was unable to use on cross-examination the abundant documentary evidence (R. 2735-2976) which he obtained only subsequent to the adjournment of the hearings at which almost all of the witnesses testified.

In proof of the fairness of the Commission's report Southern Pacific (p. 38) refers to its length. If the length of a report of an administrative agency is to be taken as evidence of its correctness, reports of administrative agencies will continue to increase in length.[2]

In contrast to the majority report of the Commission herein, which covers 131 pages (R. 3547-3678), the dissenting opinion of Chairman Eastman consists of only 19 pages

---

[1] The report was the report of the Bureau of Inquiry of the Interstate Commerce Commission. It was made in 1939 upon data obtained by its special agent Boyd ten years previously.

[2] The voluminous and obscure nature of the Interstate Commerce Commission's publications was criticized by the Senate Committee on Interstate Commerce in Senate Report 1170, on "Modification of Railroad Financial Structures" (p. 77), made in connection with S. 1253, 79th Cong., 2nd Sess.

of the printed record (R. 3713-3732). Within these limits Chairman Eastman, already then in failing health and without having presided at the hearings, taking time from his then important and pressing duties as Chairman of the Commission, gave a clearer idea of the vicissitudes suffered by debtor as a result of the wrongful and illegal control by other railroads than did the lengthy majority report.

In respect to petitioner's contention that the District Court made no investigation of his charges, Southern Pacific (p. 39) claims that he took no exceptions to the reports of the Trustee and made no motion in the District Court for any investigation by the Trustee. Petitioner is on record as to the failure on the part of the Trustee to cooperate with him in obtaining information as to the issues raised by his charges. Indeed, the Trustee placed impediments in his way when he tried to obtain such information (R. 1663). Just how petitioner by motion in the District Court could compel the Trustee to make a bona fide investigation is not evident.

The fact that the Trustee's investigations and reports were only of a perfunctory nature is relevant to petitioner's contention that neither the Commission nor the District Court made that investigation necessary to assure control of the debtor in the interest of all of its security holders upon emergence from reorganization.

As to Southern Pacific's discussion of Point III of petitioner's brief:

That the allegations of the complaint and the contents of the Western Agreement were newly discovered evidence has been fully shown in the discussion in petitioner's brief (pp. 42-47).

As to the fact that the suit constitutes a new development, Southern Pacific avers that: "Actually, the suit would not have any effect upon the decision and is of very doubtful relevancy" (S. P. Brief, p. 40).

The relevancy and importance of the Government's suit to the issues on the appeal to the Circuit Court of Appeals is fully discussed in petitioner's motion to remand (R. 5337, 5337-5379).*

Petitioner there shows that under the illegal agreement set forth in the Government's complaint, other railroads, competitive with debtor, slowed up the movement of transcontinental traffic over their more expeditious and direct routes to accommodate the more circuitous routes of the Southern Pacific.

Southern Pacific in consideration thereof, in order not to take traffic from these roads, failed (1) to perform the Turney-Saunders agreement to solicit traffic preferentially for the debtor; (2) to lease the property of the debtor, which would have been accompanied by large savings in operation and a great increase in traffic to debtor; and (3) to take various other steps in the development of debtor. If these steps had been taken by Southern Pacific,—or even only some of them,—the earnings of the debtor would have been greatly increased, with some detriment, however, to the earnings of other roads to which Southern Pacific was under obligation.

Another consideration moving from the other railroads to Southern Pacific was their acquiescence in the excessive car rental charges of Pacific Fruit Express, in which company Southern Pacific has a 50% stock interest (R. 1135). The revenue derived by Southern Pacific from Pacific Fruit Express at the time constituted a large proportion of its total income (R. 5378).

Southern Pacific argues (p. 41) that loss of perishable traffic moving over the circuitous joint route maintained by Southern Pacific with debtor for traffic originating

---

* Petitioner's statement in the hearings before the Senate Committee on Interstate Commerce, 79th Cong., 2d Sess., on H.R. 2536 (Bulwinkle Bill) contains a brief discussion of some of these facts (see pp. 664 *et seq.*).

west of El Paso would result in harm to the debtor. The proof in the record in the hearings before the Commission and the additional proof obtained in the hearings before Judge Davis shows that the perishable traffic moving over these joint routes was carried at a loss in net railway operating income to debtor of one million dollars per annum (R. 900-925, 3637, 5366-74, 5490-91).

It is Southern Pacific's contention that the outcome of the Government's suit against the railroads west of the Mississippi will not be known for a long time. In a footnote it is stated: "Two years after the motion was made the suit has still not been brought to trial" (S. P. Brief, p. 40).

As appears from petitioner's brief (p. 46), the Government and the defendants were to meet with the Court on January 16, 1947, for the purpose of recommending that the Government be allowed to start putting in its case on April 1, 1947, under a shortened trial technique. Petitioner's latest information from the office of the Attorney General is that the case is set for trial on April 23, 1947, and that a stipulation has been entered into, which met the court's approval, that since the case is wholly documentary the Government will complete its prima facie case in from one to three days.

As to Southern Pacific's discussion of Point IV of petitioner's brief:

Southern Pacific compares the position of a successor judge in approving a reorganization plan of the Commission in a Section 77 proceeding to the position of a successor judge in ruling upon a motion for a new trial after a verdict has been rendered or findings of fact and conclusions of law have been filed by the judge who presided at the trial (S. P. Brief, p. 47). It is the theory of Southern Pacific that in ruling upon a motion for a new trial after findings of fact, the successor judge is merely passing on the legal sufficiency of the evidence.

In many instances, however, it has been found necessary by statutory enactment to confer such power on a successor judge. An instance in point is the amendment to the federal statute enacted after *Malony* v. *Adsit*, 175 U. S. 281, discussed in petitioner's brief in support of his petition (p. 48).

Southern Pacific, in making its comparison, disregards the fact that it is mandatory on the court under subsection (e) of Section 77, if objections are filed to the plan of reorganization, to "hear all parties in interest in support of, and in opposition to, such objections to the plan * * * ." Thus, the function of the judge in a Section 77 proceeding is not limited to reviewing the proof in the record in the hearings before the Commission.

Southern Pacific (p. 48) further argues that inasmuch as findings of fact by the court are not contemplated in a Section 77 proceeding, on that account "any limitations imposed by Rule 63, contingent upon whether death of the presiding judge occurred before or after he had made findings of fact" are not applicable.

Rule 63 does not create the right to a new trial upon the death of the judge who presided. Rule 63 and its predecessor statute conferred the right on a successor judge to pass upon a motion for a new trial, but only if the death or disability of the presiding judge occurred after a verdict or findings of fact and conclusions of law had been filed (Petitioner's Brief p. 48). The absolute right to a new trial upon the death of a judge existed long previous to the enactment of Rule 63 or its predecessor statute, and quite irrespective of whether findings of fact were or were not necessary in connection with an action at law, a suit in equity or any other legal proceedings.

Southern Pacific, with all its fine-spun but fallacious arguments, cites no decisions in support of its position that, in hearings upon objections in a Section 77 proceeding, upon the death of the presiding judge a new trial

is not a matter of right. Even if Southern Pacific's reasons for making an exception to the general rule were sound, which is not the case, the remedy is to be found not in the courts but in the legislature.

It is highly probable that Judge Moore in the instant case would not have failed to review the proof in the record before the Commission, if he had availed himself of the opportunity of holding hearings upon the objections and of addressing such questions to witnesses and counsel as would have contributed to his understanding of the case.

Southern Pacific states that the testimony introduced in the District Court was entirely improper or immaterial. If it was permissible for the Commission to consider the record of earnings of debtor after September 1939 in estimating prospective earnings,—as it undoubtedly was,—it was permissible to place in the record in the hearings before Judge Davis proof as to the illegal impairment of such earnings.

Southern Pacific in its brief (p. 50) states that petitioner never filed any motion to take additional testimony though "Judge Moore's order taking the case as submitted on the record made before the Commission and Judge Davis, contained a provision that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182)." A similar statement is made by respondents Chase National Bank and Mississippi Valley Trust Company (Brief, p. 26) and Protective Committee for the First Terminal & Unifying Mortgage bonds (Brief, p. 16).

The Circuit Court of Appeals held (R. 5567):

> "Nor is participation, by argument and brief, in the hearing under the order sufficient to constitute waiver even though Mr. Meyer did not therein reiterate his right to new trial."

The Court erred in stating that petitioner did not so reiterate his right to a new trial. This error was undoubtedly due to the fact that the reply briefs of Southern Pacific (p. 100), and of the debtor (p. 10), submitted to the Circuit Court of Appeals, contained statements to the effect that petitioner had made no such motion.

Inasmuch as the District Court had held that petitioner was not entitled to a new trial, there was no occasion to reiterate that right by argument or brief.

But petitioner did, in accordance with the opportunity afforded by the terms of the Court's order, move to reopen the proceedings for the purpose of taking additional testimony and documentary evidence.

While the transcript of petitioner's oral argument before Judge Moore is not part of the record herein, it appears from said transcript that at the opening of his oral argument on May 31, 1943, petitioner said: "* * * I desire to have the proceedings reopened for the purpose of taking additional proof, documentary evidence and testimony * * *. I am here primarily to move to reopen the proceedings * * *" (pp. 3, 4). At the conclusion of his oral argument, petitioner again stated: "* * *I respectfully move that the Court should reopen this case" (p. 69). His reasons for so moving were stated at considerable length.

Petitioner's brief submitted to the District Court is entitled:

> "Brief of Walter E. Meyer, Intervener, in support of his motion for reopening of the proceedings, and in support of his objections and statement of claims for equitable treatment in respect of the plan of reorganization of the debtor."

In the conclusion of his brief petitioner requested that the proceedings be reopened to enable him to take additional proof.

As to the Briefs in Opposition of the Other Respondents:

Changed conditions form the subject of debtor's and Southern Pacific's petitions and briefs in support thereof filed with this Court and Point V of petitioner's brief (pp. 51-61). This subject is discussed in the briefs in opposition of the Guaranty Trust Company (pp. 5-18); of the Protective Committee (pp. 16-29); and of The Chase National Bank and Mississippi Valley Trust Company (pp. 7-21).

In all of these briefs in opposition, petitioner is grouped with the two other petitioners, Southern Pacific Company and the debtor, as maintaining that the debtor is solvent. In the opinion of this petitioner debtor is at present solvent. In the discussion in his brief of changed conditions, however, petitioner makes no reference to debtor's solvency.

The changed conditions which in the opinion of petitioner it is reasonable to assume that the Commission could *not* have envisaged at the time of its report in June, 1941, and its supplemental report in March, 1942, are (a) the extraordinary earnings of the debtor during the war and the post-war period; (b) the large decrease in indebtedness; and (c) the very great increase in net current assets, including large amounts of cash available to pay maturities past due in the order of their seniority.

The Commission's plan provides for a capitalization of $75,000,000. The total indebtedness as of January 1, 1942, was $83,243,643 (R. 3785). Thus $8,243,764 of indebtedness remained unprovided for (R. 3782).

Indebtedness in the amount of $10,207,820 has been paid off since the supplemental report of the Commission of March 9, 1942.

As appears from the Comparative General Balance Sheet of debtor for the ten months ended October 31,

1946, which is annexed to the petition of debtor (Appendix B, pp. 60-61), net current assets as of that date, amounted to $22,090,504. Total current assets amounted to $32,545,847. These included: Cash, $1,281,304; Temporary Cash Investments, $21,708,620; and Special Deposits, $1,385,962. Total current liabilities amounted to $10,455,343.

As of November 30, 1946, net current assets amounted to $22,632,345. There has been no substantial change in the cash position of debtor (Dist. Ct. Pr. R. 10636-37).

For December, 1946, debtor earned in net income over and above interest charges $621,233. The carloadings of debtor for the first six weeks of 1947 amounted in round figures to 46,000 cars as compared with 43,000 cars for the same period of 1946 (Moody's Railroads). With a 17.6% rate increase, it is reasonable to expect that debtor will earn in net income over and above interest charges for the year 1947 an amount at least equal to the $4,665,668 earned in 1946.

There is cash in the treasury of the debtor available for the reduction of indebtedness in the amount of at least $17,000,000. Thus, together with reduction in principal and accrued interest already made, as compared with January 1, 1942, it is practicable to reduce the indebtedness in all by over $27,207,820, or 32.7%. By these means maturities, bearing interest for the most part at 5 percent, could be so reduced as to effect savings of $800,000 per annum, thus permanently increasing debtor's earnings in normal times at least in that amount (Petrs. Brief, p. 57).

These, and not the solvency of the debtor, are some of petitioner's reasons why changed conditions necessitate a new plan of reorganization.

The briefs in opposition rely upon the holding of this Court in the *Denver* case as a precedent to preclude consideration of changed conditions in the case of the debtor.

In the *Denver* case the petition for reorganization was filed on November 1, 1935, and the plan was to become effective June 1, 1943. The date of the final report of the Commission was June 14, 1943. The District Court approved the plan on October 25, 1943; the Circuit Court of Appeals reversed on May 10, 1945; and this Court passed upon the matter on June 10, 1946.

In the case of the debtor, the petition for reorganization was filed on December 12, 1935; the plan was to become effective as of January 1, 1942. The date of the final report of the Commission was March 9, 1942. The District Court approved the plan on February 9, 1944, and the Circuit Court of Appeals affirmed on August 26, 1946. The petition for a writ of certiorari was filed by this petitioner on January 18, 1947.

It thus appears that in the *Denver* case the plan was formulated a year and three months later than in the case of the debtor. In the *Denver* case this country had been in the war for over eighteen months. When the plan for the debtor was formulated, this country had been in the war only three months.

In the *Denver* case the period that elapsed between the formulation of the plan and approval by the District Court was four and a half months; in the debtor's case a year and 11 months.

In the *Denver* case the period that elapsed between the formulation of the plan and the decision of the Supreme Court was three years; in the case of the debtor this period is now almost five years.

In the *Denver* case, the plan of reorganization was submitted to and approved by all the security holders with the exception of the junior bondholders. In the case of the debtor, the plan has not yet been submitted to the security holders.

The earnings of the *Denver* were greatest in 1942, the year immediately preceding the rendition of the Com-

mission's report. For the years 1943 and 1944 there were successive declines in earnings (90 L. ed. 1134, 1144). During the year 1945 there was a large deficit, to which heavy writeoffs for amortization of defense projects contributed. In 1946, however, with little or no amortization of defense projects, *Denver* was operated at a net loss of $4,079,889 (Moody's Railroads).

Debtor's earnings year after year up to and including the first nine months of 1945 showed an increase over 1941, the last full year previous to the date of the formulation of the plan (Petrs. Brief, p. 51). In contrast to *Denver's* loss for the year 1946, the debtor earned in net income over and above interest charges for the year 1946 the sum of $4,665,668.

In the opinion of this Court in the *Denver* case (90 L. ed. 1134, 1146), it is stated:

> "* * * it is clear that when the Commission made its allocations it had definitely in mind that one thing that gave the senior creditors compensation for the admission of junior claimants to participation in securities before the seniors obtained full cash payment was their chance to share in the unlimited dividends that might be earned and paid on the common stock * * * in the 'lush years'."

In a footnote the Court refers to three statements in the report of the Commission, 254 I. C. C. at 365, 364 and 366, respectively, confirmatory of this.

There are no such statements in the report of the Commission in the case of the debtor.

In the *Denver* case one of the issues was whether the additions and betterments in the amount of $43,291,513 so increased the earning prospects of the road as to justify a greater capitalization (90 L. ed., p. 1144). While the reduction in principal indebtedness was comparatively small in the *Denver* case (p. 1149), in the case of the

debtor, as we have seen, it has been of considerable importance. In addition, in the case of the debtor the cash in the treasury in proportion to total capitalization is very much greater than in the case of the *Denver*.

The present plan, if adopted, while redounding greatly to the advantage of Southern Pacific Company, The Chase National Bank and the Mississippi Valley Trust Company, will result in great injustice to other security holders.

It is petitioner's contention that Southern Pacific instigated these reorganization proceedings prompted by ulterior motives (Pet., p. 9). Chairman Eastman of the Commission pointed out the advantageous position Southern Pacific would be in upon the termination of the reorganization proceedings (R. 3730-31). Neither the majority members of the Commission nor Chairman Eastman could have imagined the extraordinary advantages that will accrue to Southern Pacific and the creditor banks if the present plan of reorganization is put into effect.

These advantages appear from the following:

Under the present plan $18,749,961 new common stock will be issued.

As of January 1, 1942, Southern Pacific's claim amounted to $17,882,250 and with accrued interest to $23,456,025. Southern Pacific is to receive $4,355,844 Consolidated Mortgage 50-year 4's or 18.6%; $7,213,447 5-percent preferred stock or 30.8%; and $10,351,672 new common stock or 44.1%; or in all $21,920,963 par value of new securities or 93.5% of its claim (R. 3785).*

Southern Pacific thus receives 55.21% of the new common stock to be issued.

* In addition to receiving securities in the new company, Southern Pacific and the banks retain their Southern Illinois and Missouri Bridge Company bonds now held by them as collateral. Of these Southern Pacific holds $474,000 par value; Chase National Bank $98,000; and Mississippi Valley Trust Company $28,000 (R. 3781).

On balance, since January 1, 1942, the effective date of the plan, there has been a reduction of accrued interest owing to Southern Pacific in the amount of $3,990,288, or 17.0% of the total amount of its claim as of that date (Petrs. Brief, p. 55).

If the free cash in the treasury in the amount of $17,000,000 is distributed to the common stockholders, this would be equal to $90.67 per share. On the basis of, say, a cash dividend of $90 per share the new common stockholders would receive $16,874,965. This on Southern Pacific's $10,351,672 par value of new common stock would amount to $9,316,505. In addition to the $3,990,288 reduction in accrued interest already paid, by such cash distribution Southern Pacific would receive in all the sum of $13,306,793 in reduction of its claim of $23,456,025 as of January 1, 1942.

With the total amount of its claim reduced to $10,149,232, Southern Pacific would still be the owner of $4,355,844 First Mortgage bonds; $7,213,447 5% preferred stock and $10,351,672 common stock, or a total of $21,920,963 of securities of the new company.*

The indebtedness to the Chase National Bank amounts to $3,500,000 and with accrued interest to January 1, 1942, to $4,557,591. For this the Chase Bank receives under the plan $896,845 or 19.7% in Consolidated Mortgage 50 year 4s; $1,485,210 or 32.6% in 5% preferred stock; and

---

* The Circuit Court of Appeals stated, referring to the claims of Southern Pacific and the banks, that the participation in the plan allowed these creditors "seems to be based on the value of pledged security rather than face of loans plus accrued interest" (R. 5670). Petitioner pointed out in the brief in support of his petition (pp. 59-60) that Southern Pacific was entitled to be treated as a secured creditor only to the extent of $7,165,485 of the face amount of its claim. Interest on this claim up to January 1, 1947, amounted to $10,044,338 (Petitioner's Brief, p. 55), or 56% of the claim. The President in his memorandum of disapproval of Senate Bill 1253 stated that one of the objections to the bill was that it failed "to direct specifically the immediate reduction of the grossly excessive interest rates now wasting the funds of the railroads in Section 77 proceedings."

$2,131,354 or 46.8% in common stock, a total of $4,513,409, or 99.1% of its claim, and, in addition, retains $98,000 Missouri Illinois & Southern Bridge Co. bonds. On balance, accrued interest as of January 1, 1947, as compared with the interest due on January 1, 1942, has been reduced by $867,125. Assuming a cash dividend of $90 per share on the new common stock, the loan would be reduced to $1,772,247. The Chase Bank would thus have a total commitment in the new company of $1,772,247, as against which it would have securities of a total par value of $4,513,409 in the new company and $98,000 par value of the Bridge Company bonds.

Similarly, the loan of the Mississippi Valley Trust Company would be reduced from $1,302,169 as of January 1, 1942, to $506,832, as against which it would have securities of a total par value of $1,288,956 in the new company and $28,000 par value of the Bridge Company bonds.

It is not necessary to assume that all of the cash available will be distributed immediately to the common stockholders to demonstrate, as appears from the above, the inequity of the present plan.

That, if the plan is approved, Southern Pacific, as dominant and virtually controlling stockholder, will be in a position to cause debtor to make such distribution, there can be no doubt.

CONCLUSION

For the reasons urged therein, the petition for a writ of certiorari should be granted.

Dated: New York, February 28, 1947.

Respectfully submitted,

WALTER E. MEYER,
Petitioner, *Pro Se,*
And as Attorney for other Stockholders.

R. WALSTON CHUBB,
Attorney for Petitioner.